IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.657 OF 1998

1. Ajay Kumar Biswal

2. Ismail Ibrahim Shaikh Appellants

versus

The State of Maharashtra
and another Respondents

Shri Subhash Jha for appellants.

Shri K.V.Saste, APP for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 20.12.2005

DATE OF PRONOUNCING THE JUDGEMENT : 28.03.2006

JUDGEMENT :-

1. This appeal is by the accused in Sessions Case No.785 of 1986. The accused have been convicted by the learned Additional Sessions Judge, Mumbai for offences punishable under section 307 read with 34 of the Indian Penal Code, 1860. They are directed to suffer rigorous imprisonment for a period of five years and to

pay Rs.5,000/- as fine. In default, they were to suffer rigorous imprisonment of 15 months each.

2. The prosecution case is as under. The complainant Bajirao and the appellants are in employment of Galas situate in an industrial shed at Lower Parel, Mumbai. The industrial shed is named as Shah and Nahar Industrial Estate. The incident occurred in the compound of Shah and Nahar Industrial Estate. The time of the incident is 1'o clock in the afternoon. It is alleged that the complainant had gone to adjoining industrial estate in connection with his duty. He returned to the place of his employment located on fourth floor in the building of Shah and Nahar Industrial Estate. Accused Ajay (A-1) went to the complainant and called him down stairs. The complainant accompanied Ajay. When both of them were on the staircase between 2nd and 3rd floor other accused Ismail (A-2) joined them. It is alleged that before complainant Bajirao realised anything, both accused bodily lifted him and threw him to the ground. The complainant Bajirao sustained number of injuries on his person. All of them were caused to the right part of his body. Prosecution Witness No.6 Tejuddin removed injured

Bajirao to the hospital. He reached K.E.M. Hospital at about 1.45 in the noon.

3. Prosecution Witness no.3 Shashikant Pawar, a Constable attached to Bhoiwada Police Station, was at the relevant time present at K.E.M. Hospital. Realising that it was a Medico- Legal case, P.W.3 made preliminary inquiry with Bajirao. During the course of that inquiry Bajirao told P.W.3 Pawar the manner in which the injuries were sustained by him. He told Constable Pawar that two persons namely the accused herein had bodily lifted him and he was thrown from the third floor of the building and injuries sustained by PW-1 Bajirao were by the acts of accused-appellants.

4. The Medical Officer attached to K.E.M. Hospital admitted Bajirao in Ward No.6. At about same time, PW-7 Pednekar who was then attached as Police Inspector at N.M.Joshi Marg Police Station received a Wireless message from the Control Room to attend to a patient admitted in the K.E.M. Hospital. He appears to have deputed PSI Shirke and some other Constable to attend the patient. It is alleged that when Shirke reached K.E.M. Hospital at about 2.45 in the noon, the Doctor

restrained him from recording the statement of Bajirao. The Doctor found that the injured Bajirao was in drowsy condition. PSI Shirke obtained certificate of Medical Officer at about 1.45 in the noon. Condition of the injured remained unchanged till about 6.45 p.m. in the evening. At this time, the Medical Officer permitted PSI Shirke to record statement of the injured. PSI Shirke recorded the statement of the injured Bajirao in question and answer form. That time P.W.1 Bajirao has reiterated that it was the accused Ajay and Ismail who had thrown him from the staircase of 2nd and 3rd floor of the building of Shah and Nahar Industrial Estate. He has also disclosed the motive for commission of the said offence. According to him the accused Ajay and Ismail had an affair with two lady employees by name Khairu and Ayashabi, that the accused suspected that it was the complainant Bajirao who had disclosed the said affair to the Manager.

5. It is further alleged that while the complainant was under interrogation, both the accused persons were shown to him. He had identified both of them in the presence of PSI Shirke and Medical Officer Shri Maskar. The

latter had made an endorsement in the complaint that Bajirao was fully conscious and that the F.I.R. was recorded before Doctor Maskar. As such at about 6.48 p.m. on 2.8.85 the offence u/s 307 of the Indian Penal Code was registered. The accused were arrested. Earlier P.W.7 Pednekar had visited the spot and had drawn the panchanama. He did not find any incriminating article at the spot. The clothes on the person of the injured were seized under the panchanama. They were sent to the C.A. for examination and the report of the C.A. was obtained. After completing the usual investigation the accused came to be chargesheeted. It is therefore,alleged that both accused in furtherance of their common intention had attempted to commit murder of P.W.1 Bajirao and in accomplishing the said object P.W.1 Bajirao was bodily lifted from the staircase of 2nd and 3rd floor and was thrown on the ground floor.

6. The learned Metropolitan Magistrate had committed the case to the Court of Sessions. The charge was read over and explained to both the accused. Both of them pleaded ‘not guilty’ and claim to be tried. At the outset the defence of the accused is that of a total denial. The oral

evidence adduced by the prosecution, comprises of deposition of seven witnesses. The main witness is the complainant Bajirao. He was examined under Exh.8. The F.I.R. is at Exh.9. The person who had admitted injured Bajirao to K.E.M. Hospital by name Tezuddin is examined as P.W.6 at Exh.21. A co-employee who works along with the accused and Bajirao by name Shaikh Ibrahim was examined as P.W.2 at Exh.10. He is a formal witness. He testifies that he knew both, the accused and complainant Bajirao, from one year prior to the incident. He also adds that he does not know how the incident had occurred.

7. The spot panch by name Dudhnath was examined at Exh.14. He merely identifies his signature on that panchanama. He is equally formal witness. The Medical Officer Doctor Shenoy was examined as P.W.5 at Exh.18. He has deposed that all the injuries, 9 in number could have cumulatively endangered the life of the complainant and he could have died. There were number of fracture injuries. Besides there was deformity noticed on the mandable with loss of left lower incisor and over right side xygoma, which was probably a fracture. He adds that Bajirao was an indoor patient from 2.8.85 to 7.11.85. The prosecution

has then examined two police witnesses. A constable posted in K.E.M. Hospital by name Pawar is examined as P.W.3 at Exh.12. The I.O. A.C.P.Pednekar was examined at Exh.22. The latter appears to have took over the investigation from PSI Shirke who had earlier recorded the statement on P.W.1 Bajirao at Exh.9. After necessary investigation was complete and charges were framed by the Sessions Court, evidence was recorded.

8. The prosecution witness no.1 Bajirao has deposed that in 1985 he was serving in Lower Parel. He was serving in Cliff Company as Overlock Operator. The premises of the said company are situate in Sainath Industries. They were in Gala Nos.409 and 410. He mentions that there is Adhyaru Industrial Estate near the premises of Cliff Company. He thereafter deposes that Shah and Nahar Industrial Estate is also situate at Lower Parel.

9. He deposes that there are 30 workers employed in Cliff Company. Some of them are ladies. He states that the accused are serving as Labourers in Cliff Company. He names the owner of the company as one Ahamad Baiganwala. He gives the

name of Manager as well. The date of incident is 2nd August 1985. He says that on that date he had reported to work. He had gone to Adhyaru Company (Industrial Estate) for repairing defective goods. He states that he returned to Sainath Industries. At that time it was 1'0 clock afternoon. He states that the accused Ajay called him out of the company. He, therefore, went out. Accused Ajay asked him to come down. Accused Ajay took him between 2nd and 3rd floors on the staircase. That time accused Ajay was alone. When he enquired with Ajay as to what happened, at that time, accused no.2 Ismail came near them.

10. It is his version that before he could realise anything, both accused bodily lifted him and threw him from the staircase to the ground floor. He fell on his right side. He states that there was a fracture injury to the right leg and on the cheek. He says that he was taken to K.E.M. Hospital and admitted therein. He states that after the statement was recorded by Inquiry Officer, he was shown the accused at the Hospital on 2nd August 1985 and he identified both in presence of the Inquiry Officer. It is based upon his statement that the First Information

Report was prepared. He states that he was under treatment for three and half months at K.E.M. Hospital. He was unable to move out because of the fracture injuries. He says that his entire body up to the neck was under plaster and he was not in a position to do day to day work even after discharge from the Hospital.

11. In paragraph no.6 of his deposition this is what he states :-

> "When accused Ajay called me out that time I was working on the 4th floor. I went to the 3rd floor to see accused Ajay. However I was actually thrown from the staircase in between the 2nd and 3rd floor by both the accused. The incident occurred due to an affair between accused persons and Asha and Khairu. I do not know the full name of Asha. Both the accused persons had suspected that I had disclosed the said affair to the Manager Mehendi, and therefore they had attacked me. Both the workers by name Asha and Khairu were in the employment in the company. At the time of the incident I was wearing pant and the shirt. They were seized by the police during the course of the investigation. I will be able to identify the clothes if they are shown to me."

12. In his cross examination PW-1 has stated that previously he was working in Shah and Nahar Industrial Estate. He then states that the company was not maintaining muster book. The

company does not have any record showing the years that he served and worked therein. He says that the company will not able to say anything about other workers. He further states that on the date of incident while returning to Shah and Nahar Company one Govind Master was with him. He reached Shah and Nahar Company at about 12.45 in the noon and was there for 15 to 40 minutes. He states that other workers were there in the Industrial Estate (Shah and Nahar) when he and Govind reached there. He is not in a position to state as to how many workers were there. He says that he was there in Shah and Nahar Company till about 1.00 in the afternoon.

13. In his cross examination he states that he did not tell Govind Master, before leaving the room, that he was called by accused Ajay. He states that Ajay waited at his place of work for about two minutes. He did not ask Ajay as to why he wanted him to come outside. As soon as PW-1 and Ajay reached the staircase of 2nd and 3rd floors, other accused Ismail came and according to PW-1, there was no talk or conversation between him and the accused persons. He states that distance between two Industrial Estates namely Shah and Nahar and Adhyaru is about 5

minutes walking distance. However, his statement in the cross examination is "I do not remember how many floors are there to the building of Shah and Nahar Industrial Estate. I also cannot say how many floors are there to the building of Adhyaru Industrial Estate. I also do not know how many Galas are there in each of those Industrial Estate." In paragraph no.8 of his deposition, PW-1 states that there are number of Galas in Shah and Nahar Industrial Estate. He states that there are number of visitors and passers-by to the industrial area. He volunteers and states that the place from where he was thrown on the ground floor is outside and isolated. When asked as to what does he mean by the word "isolated" he states that people are in a position to see a person standing on the staircase between 2nd and 3rd floors. In his cross examination he further states as under:-

> "So also a person standing in the compound of that Industrial Estate is in position to see the staircase between 2nd and 3rd floor. I could not raise the shout when the accused had bodily lifted me. In my first statement I had stated to the I.O. that the accused Ajay had come to the place of my work and he had called me to come down. I had also stated that I had gone to Adhyaru company for checking the defects of the goods. I had also stated that I had worked in Shah

> and Nahar company till about 1-00 in the noon and thereafter the accused Ajay came to call me. I had also stated that the accused Ajay took me on the staircase between the 2nd and 3rd floor. I had stated to the police that I had asked the accused Ajay as to what happened and later on the accused Ismail came to that staircase. These facts are not mentioned in my first statement. I cannot assign any reason why they are not mentioned."

In paras 11 and 12 of his deposition that is what he states.

> 11. I was conscious when I fell down on the ground floor. I was in position to speak and to move my hands. I cannot give the time when the first statement was recorded on 2nd August, 1985. I was taken to the hospital immediately after I had sustained the injuries. I cannot say at how many places I had signed the papers on the request made by the police. I however remember that besides the F.I.R. and the earlier first statement I had not signed any other papers. After the police had recorded my earlier statement the subsequent statement was recorded after about 2 days. I do not remember if the I.O. had recorded any other statement. I do not remember if I had repeated the same contents in my subsequent statement dtd.4.2.85. I had stated in my subsequent statement dtd. 4.2.85 that I was not in position to speak on the earlier occasion on 2.8.85 because of the injuries and therefore the exhaustive facts were not narrated on 2.8.85. That fact is not mentioned in the F.I.R. dtd. 4.8.85. I cannot assign any reason why it is not mentioned. I had stated to the I.O. the reasons as to why the accused had committed the alleged offence. In the complaint at Exh. the said fact is not mentioned, and I cannot assign any reason

why it is not mentioned.

12. The height of the wall may be about 3 1/2 ft. from the wall from where I was thrown to the ground floor. It is not true that the height of that wall is less than 3 ft. It is not true that without any justifiable reason while the accused persons were standing on the stair case between 2nd and 3rd floor, I had picked up a quarrel with them or that there was scuffle between me and both the accused. I did not know the affair of the accused persons with those two girls prior to the date of the incident. It is not true that I had picked up the quarrel with the accused over those two girls as I was treating them as my sisters. It is not true that in the scuffle between me and the accused I had lost the balance and fell from that wall to the ground floor. It is not true that I am taking the names of both the accused because of the previous enimity. It is not true that the accused Ajay had not called me from the place of my work. It is not true that I am deposing false that both the accused had bodily lifted me and had thrown me to the ground floor from the stair case of the 2nd and 3rd floor. It is not true that I am deposing falsely against the accused."

14. I have referred to the deposition of PW-1 in detail because the learned Judge proceeds on the basis that it is only the solitary testimony of PW-1 who is a victim as well as a witness which is relevant in this case. The learned Judge is aware of the principle that before his testimony is accepted and acted upon, the same is liable to be scrutinised with all care and caution. If such testimony inspires confidence that the Court

can accept the same, is the finding of the learned Judge.

15. Shri Jha - learned counsel appearing for the appellants assails the findings and conclusions of learned Trial Judge. He submits that the Trial Judge was in obvious error in accepting the testimony of PW-1.

16. He submits that the learned Judge has not appreciated Section 307 of the Penal Code in its true letter and spirit. He submits that the ingredients thereof namely "intention", "knowledge" and "circumstances" have to be specified before it can be said that a person is guilty of the offence thereunder. He submits that there is no evidence about knowledge. It is being inferred from the circumstances. The prosecution has not led any evidence about the height from which the victim/complainant (PW-1) was allegedly thrown. He submits that apart from no intention, no knowledge and no circumstances, it is clear that neither are any co-workers examined nor the women employees who are allegedly the cause of the incident. In the submission of Shri Jha if the cause of the incident was the alleged illicit relations or the

harassment to the women employees which agitated PW-1, then their non-examination and in any event no explanation in that behalf being forth coming, are vital factors and learned Judge could not have ignored them. An adverse inference will have to be drawn as it is well settled that had these witnesses been summoned and examined, they would have deposed against the case of prosecution. He relies upon several decisions of Supreme Court laying down above principle.

17. He submits that the prosecution's version that no statement could be recorded of the PW-1 till 6.45 p.m. on the date of incident, is not substantiated. He submits that PW-1 was in a position to speak but statement is not recorded.

18. That apart, according to Shri Jha, if such an incident occurs at the place of employment, it is inconceivable that employees and passers-by would not notice the same. It is indeed surprising that nobody has seen the appellants or at least the accused Ajay going towards PW-1 and talking to him or lifting him allegedly along with other accused Ismail. He submits that it is inconceivable that the appellants would go and have lunch after the incident and their not

leaving the premises is also of some relevance. The conduct of PW-1 in not raising an alarm and only mentioning the incident as some sort of altercation or quarrel or fight, casts serious doubt on the prosecution case. He submits that if the entire deposition is perused it is clear that PW-1 admits that a person can fall by loosing balance and it is probable that such a thing could happen. He invites my attention to the statement recorded by Bhoiwada Police Station wherein PW-1 has stated that there was fight between appellants and PW-1. There is a deviation from the version and therefore, the story is totally unreliable.

19. For all these reasons Shri Jha submits that the appeal be allowed by setting aside the judgement and order of conviction and sentence.

20. Shri Saste - learned APP supports the impugned judgement and contends that the alleged loop holes and infirmities emphasised by Shri Jha cannot have any bearing inasmuch as the incident is admitted. He, therefore, submits that the appeal deserves to be dismissed.

21. In view of the rival submissions the

following points arise for my determination :-

a) Whether the judgement and order of the learned Additional Sessions Judge convicting the appellants for offence punishable under section 307 read with 34 of the IPC is valid, legal and proper?

b) If the answer to question is in the negative, then whether Judgement and Order should be set aside?

22. My finding on the above mentioned question (a) is that the judgement and order of conviction and sentence is not sustainable and, therefore, requires to be set aside. The reasons for the above conclusion are set out hereinbelow.

23. Section 307 of the Penal Code reads as under:-

"307. Attempt to Murder :-

Whoever does any act with such intention or knowledge, and under such circumstances that, if he, by that act, caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if

> hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.
>
> Attempts by life convicts :- When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death."

A perusal of this provision indicates that the ingredients thereof are that the Act must be with such intention or knowledge and under such circumstances that if by that act person doing it causes death, then he would be guilty of murder and if hurt is caused by the said act, the offender shall be liable either to imprisonment for life or to such punishment as is mentioned in the earlier part of the provision.

24. In the present case the complainant Bajirao alleges that he was serving in Lower Parel in Cliff Company as an Over Lock Operator. He describes the location of the premises of this company. He says that they are situate in Sainath Industry. That is according to him Gala Nos.409 and 410. Then he states that there is another Industrial Estate near the said Industrial Estate. The Industrial Estate Shah and Nahar is also situate in Lower Parel. He

states that there are 30 labourers employed in his company namely the company he is serving i.e. Cliff Company. He states that the appellants are co-workers. As far as incident of 2nd August 1985 is concerned, he states that he had gone to another company for repairing defective goods and returned to Sainath Industries premises at about 1'o clock in the noon. It is thereafter that the accused Ajay called him outside the company. Then he states that accused Ajay asked him to come down. It is stated by him that accused Ajay took him between 2nd and 3rd floors on the staircase. That time accused Ajay was alone and later on accused no.2 Ismail joined them. He states that he asked Ajay as to what happened and this was prior to Ismail joining them. He then states that before he could realise anything, these accused lifted him bodily and threw him from the staircase to the ground floor and he fell on his right side and the injuries were caused to him. In his deposition he then narrates as to how the incident was recorded by the I.O..

25. It is pertinent to note that in his deposition itself, at para 6, he states that when accused Ajay called him he was working on the

fourth floor. He came down to 3rd floor to see accused Ajay. But he was actually thrown from the staircase in between 2nd and 3rd floor by both accused. The reason, according to him, is that because these accused had an affair with two ladies who were working in the company. He says that the accused had suspected that the complainant disclosed about this affair to the Manager of the company, and, therefore, they attacked him. He admits that these ladies are in the employment with the company. However, in his cross examination he says that he knew the accused eight months prior to the incident. He admits that the company does not maintain any muster roll. He admits that he does not have any record showing how many years he had served in Cliff Company. The version of the complainant clearly shows that he is unable to distinguish between an Industrial Estate and company. In the earlier part of the deposition he states that Shah and Nahar is an industrial estate and he worked there. Later on, he says that Shah and Nahar is a company. Be that as it may, he has not produced anything to show that he and the appellants were employed by Cliff Company. It is pertinent to note that the complainant states that he did not tell the co-worker Govind Master

before leaving the room (Cliff Company premises) when he was called by accused Ajay. He admits that he did not ask the accused Ajay as to why he wanted him to come down. In his examination-in-chief he says that when accused called him out, he asked him before the arrival of the other appellant as to why he was called. He admits that there was no talk or conversation between him and accused Ajay. In para no.7 of his cross examination he states that he does not remember how many floors are there in the building of Shah and Nahar Industrial Estate. He also says that he cannot tell as to how many floors are there to the building Adhyaru Industrial Estate. He also does not know as to how many galas are there in each of these industrial estates. This version can be seen in the context of his statement in para no.1 of his examination in chief where he states that the premises of the company where he is working, are situate at Sainath Industry. However, he is unable to tell anything as to where Sainath Industry is located. When he states that Gala Nos.409 and 410 are his company premises, this version is not pursued by him but he clearly states that he does not know how many galas are there. In para no.8 of his deposition he states

that the place where he was thrown is on the ground floor. It is outside and isolated. He says that there is no crowd. However, he states that people were in a position to see the person standing on the staircase between 2nd and 3rd floors. Then he states that the person standing in the compound of the industrial estate, is in a position to see the staircase between 2nd and 3rd floors. This statement, if read with reference to the earlier version, then the complainant is obviously referring to Shah and Nahar Industrial Estate. He admits that he did not raise any shouts when the accused bodily lifted him. In this very para (para no.8), when the complainant's attention is invited to the statement made earlier, he states that it is not recorded therein that he had gone to Adharyu Company for checking the defective goods, that he worked in Shah and Nahar Company till 01.00 of noon and thereafter accused Ajay called him. It is also not mentioned that accused Ajay took him to staircase between 2nd and 3rd floors. He states that he told the Police that he had asked the accused Ajay as to what happened and later on accused Ismail came to the staircase. These facts are not mentioned in his first statement and he cannot assign any reason as to why they

are not so mentioned.

26. His further version is that he fell unconscious after the fall. Here, it is pertinent to note that his statement is "I was unconscious when I fell down on the ground floor". He states that he was in a position to speak and move his hands. He was taken to the hospital after he sustained injuries. He says that besides an FIR, earlier there was a statement recorded which is signed by him. There was about two days gap in the earlier statement and the subsequent statement. In the suggestion to him that has he repeated the same contents in his subsequent statement, he says I do not remember. He states that in subsequent statement dated 4th August 1985 he had stated that he was not in a position to speak when his earlier statement was recorded on 2nd August 1985. He once again could not assign any reason as to why there is an omission.

27. He has not been able to give any particulars with regard to the height of the wall because in my view, if there is a parapet wall on the staircase and he was lifted up by the accused and thrown to the ground, he is necessarily lifted

above the height of this wall. First he says that the height may be three and a half feet and it is pertinent to note that he denies the suggestion that height is less than three feet.

28. The suggestion that when the accused were standing between 2nd and 3rd floors on the staircase, the complainant had a quarrel with them or that there was a scuffle, is denied by him. However, his further admission that he is not aware of any affair of any accused persons with two ladies prior to the date of incident speaks volumes about his deposition. Further a suggestion to him that he picked up quarrel with the accused over these two girls and there was scuffle between them in which he lost balance and fell from the wall to the ground floor, is denied. The suggestion that he has named the accused because of previous enmity is denied. In the first FIR the place of incident is described as space between 2nd and 3rd floor staircase as also open space at the ground.

29. One co-worker Shaikh Ibrahim Shaikh Haider has been examined. His deposition is that he knows the complainant. He states that the company is situate in Shah and Nahar Industrial

Estate. There are 15 to 20 workers employed in the company. Some of them were ladies. The company deals in ready-made garments. His version is that accused Ismail was serving in the company whereas other appellant Ajay was serving in another company in Gala No.9. He states in his examination-in-chief that he knows both accused as also the complainant Bajirao who is serving in Gala No.10 of the same estate. He states that although the incident took place on one Friday and he was working in the company at the relevant time, neither has he seen the incident nor does he remember the year and month thereof. All that he states is that a person had fallen from 2nd and 3rd floor.

30. In the cross examination this witness says that he did not come to know from which floor Bajirao had a fall. However, while stating that he is not in a position to give the approximate height of the wall which is by the side of the staircase, he admits that if a person bends from that wall, there is every possibility that he may have a fall. He admits that he has no personal knowledge regarding the relations between the complainants and the accused. This is the deposition of PW-2.

31. PW-3 is a Constable attached to Bhoiwada Police Station and his version is relevant insofar as the interrogation undertaken by him at the hospital. He states that the version is recorded as per the narration of injured complainant.

32. PW-4 is a Carpenter who is stating that he is working in Shah and Nahar Company. At the request of Police he signed a Panchanama. However, he admits that he was inside the company when the appellants were working outside.

33. PW-5 is the Doctor and in his cross examination he states that the injuries to the complainant could be caused mostly due to a fall from a height or by vehicular accident as there were multiple injuries on the right side of the body. The injuries could be due to accident. That cannot be ruled out. PW-6 is one employee who accompanied the complainant to the hospital. However, he admits that he will be not in a position to identify the appellants.

34. The Constable’s version is referred to already. The other version is of Assistant

Commissioner of Police, PW-7.

35. From the above it can safely be concluded that the version of the complainant about the incident and the role played by appellants therein, is not at all reliable and trustworthy. The complainant has been unable to pin point the reasons for the so called attack. Possibility that the complainant during or about lunch time had approached the workers or there was an occasion for them to meet, being in adjoining premises and on questioning, a scuffle might have taken place resulting in the fall of the complainant can not be ruled out. More so when the alleged intention to commit the crime is not established which according to complaint was reason for committing the crime. Thus, there is no material to conclude that ingredients of Section 307 have been satisfied in this case.

36. In Omprakash Vs. State of Punjab reported in AIR-1961-SC-1782 the Hon’ble Supreme Court has observed thus :-

> "A person commits an offence under Section 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards its

> commission irrespective of the fact whether that act is the penultimate act or not. The intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in S.300. The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression ‘whoever attempts to commit an offence’ in S.511, can only mean "whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence". The same is meant by the expression "whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder" in Sc.307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The expression "by that act" does not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time. The word ‘act’ again, does not mean only any particular, specific, instantaneous act of a person, but denotes, according to S.33 as well a series of acts."

37. It is not necessary that bodily injury capable of causing death should have been inflicted. To Justify a conviction u/s 307, an intention or knowledge to commit murder must exist. It is a different matter that the act fell short of that offence. Thus, it is sufficient in law if there is an intention coupled with some overt-act in execution thereof. In AIR-2004-SC-3687 (Hari Mohan Mandal Vs. State

of Jharkhand) the Supreme Court has observed thus:-

> "10. In the factual scenario noted above, it has to be seen whether Section 307 IPC has application. Said provision reads as follows :
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> "Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."
>
> To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the

> penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.
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> 11. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. If the injury inflicted has been with the avowed object or intention to cause death, the ritual nature, extent or character of the injury or whether such injury is sufficient to actually causing death are really factors which are wholly irrelevant for adjudging the culpability under Section 307 IPC. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, it is not correct to acquit an accused of the charge under Section 307 IPC merely because the injuries inflicted on the victim were in the nature of a simple hurt.
>
> 14. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstance that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307, IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury."

38. In the present case, it is clear that neither there is case made out of any intention, knowledge nor are the circumstances enough to draw a conclusion about intention or knowledge. The prerequisites for bringing home a charge u/s

307 are not made out at all. There is nothing to indicate that the appellants were agitated because of the complainant questioning them about their advancement towards girls/ female employees because they have not been examined at all. The reason for their non examination is also not explained as well. This is a fit case where an adverse inference must be drawn against the prosecution as the alleged intention was the reason for committing the crime and the witness/es proving it were not examined though available. There is much substance in the contentions of Shri Jha in this behalf. His reliance on decisions of Supreme Court reported in (1971)2-SCC-42 (State of U.P. and another Vs. Jaggo Alias Jagdish and others) and (1972)3-SCC-671 (Khatri Hemraj Amulakh Vs. The State of Gujarat) is apposite. Similarly, the version of one co-worker referred to above is also shaky and unreliable. It is doubtful whether this co-worker is working in the same company. It is also doubtful whether both appellants are working in the one and the same company. The version of the co-worker who is examined, shows that the complainant is not setting out correct position insofar as the employment of the accused persons; whether they

are co-workers or whether they know each other.

39. Shri Jha's submissions with regard to the sole testimony of the complainant being totally failing to inspire confidence, deserve to be accepted. While it is true that it is not the quantity but the quality of the witnesses or evidence which matters for determining the guilt of the accused in criminal cases, it is equally true that when a case is based on testimony of single witness, his version must be inspiring confidence and leaving no doubt in the mind of the Court. It must be so reliable that there is no scope for any suspicion at all. In the instant case, the version of complainant, which has been referred to by me in details and his conduct in not raising an alarm, is definitely a factor going against him. There is a clear improvement over his earlier version. The gap between recording of statements of complainant when he was in a position to speak is also not explained. This is a case where the complainant has been shifting his stance all through out. The suggestions given to him with regard to scuffle or quarrel would indicate that he is making out a case of being thrown by the appellants from the staircase. That fails to

inspire confidence. The possibility of his loosing balance and falling down cannot be ruled out. Shri Jha’s criticism about the deviation in the story from time to time, is also well founded. Further, complainant’s admission in the cross examination that he is unable to point out as to how many floors are there to the Shah and Nahar Company Building where the incident occurred, is crucial and fatal to the prosecution case. His inability to specify the galas is also very eloquent. His admission that there was no conversation or talk between him and the accused, is relevant and coupled with his admission that people were in a position to see a person standing on the staircase of 2nd and 3rd floors and still his not raising any alarm, shows that the whole case is unreliable.

40. The result of the aforesaid discussion is that the prosecution has failed to prove the charge against the appellants beyond reasonable doubt. The testimony of the sole witness (complainant Bajirao) is not at all trustworthy and reliable and in fact lacks confidence. It does not at all establish the charge that the appellants, with an intent and knowledge that their act would cause death, have lifted the

complainant bodily and thrown him down on the ground from a height i.e. between 2nd and 3rd floors. When the complainant who is a solitary witness changes his story and stance from one stage to another, and therefore,his version cannot be accepted at it's face value and is not corroborated in material particulars, then, it will have to held that the charge is not proved beyond doubt.

41. The learned Additional Sessions Judge could not have recorded a finding of guilt of the appellants on a weak and untrust-worthy testimony of the sole witness namely the original complainant. The learned Additional Judge should have appreciated that as far as nature of proof in criminal case is concerned, it should be a proof beyond reasonable doubt. The reason for insisting on proof beyond reasonable doubt in criminal cases is to guard against innocent being convicted and sent to jail. It is well settled that in a criminal case, burden is not on accused to prove his innocence, but the burden lies upon the prosecution to prove the case by adducing trust-worthy evidence, and that too beyond reasonable doubt.

42. The learned Additional Sessions Judge failed to abide by this elementary principle and therefore, the judgement is completely vitiated. The learned Judge has ignored material contradictions and admissions in the testimony of the sole witness. He should have been aware of this aspect of the matter. I have only to reproduce paragraph 15 of the judgement which reads thus :-

> '15. It therefore means that there is a solitary testimony of witness Bajirao on the record. He is the only witness and the victim of the incident. He being a solitary witness a rule of prudence requires that before his testimony is accepted and acted upon, the same is liable to be scrutinised with more ordinary care and caution. Only after such testimony of a solitary witness inspires the confidence of the Court that the court can accept the same. It is not illegal act to accept uncorroborated testimony of the complainant if it satisfies preponderance of probability and is in consonance with the facts and attendant circumstances of the case, then notwithstanding the fact that it is a solitary testimony, it can be still accepted and acted upon.'

43. The statement of law in this paragraph runs contrary to the settled principle which is set out in several decisions of Supreme Court namely that if the testimony of the sole witness stands contradicted in material particulars, then it

fails to inspire confidence. Such an uncorroborated testimony cannot be relied upon to convict and sentence the accused. In the present case, I have pointed out in details the contradictions and conflicting versions. The sole witness's testimony fails to inspire confidence. In any case it will be unsafe to accept his version which is self contradictory and lacks corroboration in material particulars. Therefore, it will have to be held that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

44. In the result, the appeal is allowed. The Judgement of learned Additional Sessions Judge in Sessions Case No.785 of 1986 dated 17th August 1998 convicting the appellants of charge u/s 307 and sentencing them to suffer imprisonment for five years and to pay a fine of Rs.5,000/- is set aside. The appellants are set at liberty and they be released, if they are not required in any other case. Bail bonds to stand cancelled. The amount of fine, if deposited, be refunded to them.

(S.C.DHARMADHIKARI, J.)